

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of:)	
)	
Proceeding to Implement The)	
Junk Fax Prevention Act of 2005)	CG Docket No. 05-
338		

COMMENTS AND RECOMMENDATIONS:

Introduction:

As a concerned citizen, I welcome the opportunity to comment in response to the recent passage of the Junk Fax Prevention Act of 2005. (“Junk Fax Act”) It is my hope that this letter provides a fresh perspective on how the Junk Fax Act has limited our rights and created an unfair hardship to the consumer. With the numerous complaints and lawsuits filed every day due to unwanted faxing, it is imperative that the Commission has an opportunity to fashion additional regulations that will carry out Congress’s intention to accommodate the rights and interests of both senders and recipients of facsimile advertising and other commercial information. In analyzing both sender and recipient of the fax advertising, the scale seems to now tip in the favor of the sender to the absolute detriment of the consumer. My personal experience may offer some insight into the depths of the problem.

I was awakened last night at midnight by the phone ringing. I was startled and immediately feared the worst as many of us do at late night phone calls. As I lunged at the receiver I noticed that it was the fax line ringing. "Great," I thought, "another junk fax that I do not want to receive." My household is trying a new method to stop the junk fax harassment we receive every day. We have heard that if you turn off your fax machine, the fax spamming companies will eventually take your number out of the system because they believe it is no longer a fax line. We hope and pray this is actually true.

Unfortunately for us, this is inconvenient on many levels. First of all we have to suffer through the endless ringing of our telephone at all hours of the day and night. Secondly, we are unable to receive faxes that are important to us, faxes that we actually want to obtain. We are constantly running to the office to turn on the fax machine to receive an important fax, then running back to turn it off again in order to avoid wasting more paper and ink on faxes in which we have no interest.

We have attempted to opt-out of many of the junk faxes by calling the 1-800 number on the fax advertisement. It seems, however, that for every fax that we "opt-out" of, we receive two more in its place. Often times the fax number is not legible or has been cut off in the faxing process leaving us no other alternative except for our current attempt at turning off our fax line altogether.

It is mind boggling that these actions are legal. Someone that I do not know is essentially keeping me from the quiet enjoyment of my home. Do consumers no longer have any protection from this extreme annoyance?

Background:

The federal Telephone Consumer Protection Act (TCPA) [47 U.S.C. §227] prohibits junk fax advertising and allows recipients to sue the businesses that send junk faxes. Congress has recently passed the Junk Fax Prevention Act of 2005, which sounds like it goes even farther than the TCPA in preventing consumers from receiving junk faxes. The name of the act, however, is a misnomer. Congress has essentially legalized the taking of property (paper and ink) from the public without consent. They have provided for the invasion of privacy so that commercial messages can be delivered to the private consumer without express consent during the day or the wee hours of the night. The Junk Fax Prevention Act of 2005 allows this “invasion of privacy” by creating an "established business relationship" rule for junk faxes. In effect, this means that any business that you call or visit can fax you, even if you don't give the business your fax number.

The JFPA amends the Communications Act of 1934 to prohibit a person from using any telephone facsimile (fax) machine, computer, or other device to send, to another fax machine, an unsolicited advertisement to a person who has requested that such sender not send such advertisements, or to any other person unless: (1) the sender has an established business

relationship with the person; (2) the sender obtained the fax number through voluntary communication from the recipient or from an Internet directory or site to which the recipient voluntarily made the fax number available for public distribution; and (3) the advertisement contains a conspicuous notice on its first page that the recipient may request not to be sent any further unsolicited advertisements, and includes a domestic telephone and fax number (neither of which can be a pay-per-call number) for sending such a request.¹

The only members of society who are happy with this new act are the business and membership organizations who insist on faxing their members with or without their permission. They were strongly backing the measure because it results in lower advertising costs for them. Instead of sending a direct piece of mail, which would cost them \$.37 plus printing costs, calling via phone or sending email, they can now send the same advertisement for less than \$.03 each. Virtually all the costs are shifted from the advertiser onto the recipient. Essentially these businesses can now send the public advertisements that they do not want at their expense and without consent.

The major change that Congress has established with the passing of the Junk Fax Prevention Act of 2005 is the addition of a new exemption to the TCPA called the “existing business relationship” (EBR). An EBR is defined as “a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential

¹ See Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005).

subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.²

Thus, virtually any interaction will create an EBR sufficient to allow faxing.

Under the JFPA, the FCC may limit the EBR if it has:

- (1) determined that, the EBR exemption results in significant number of complaints;
- (2) determined that a significant number of complaints involved unsolicited faxes sent under an EBR that is older than what the FCC believes is consistent with the reasonable expectations of consumers;
- (3) evaluated the costs to senders of demonstrating the existence of an EBR and the benefits of establishing a limitation on an EBR; and
- (4) determined that small businesses would not be unduly burdened.³

This raises the broader question of the scope of the FCC's discretion in implementing this act. The FCC's ability to limit the EBR is determined by the language of the statute and whether or not the plain meaning is deemed ambiguous. The appropriate review standard was well settled in *Chevron USA v. NRDC* (1984). If the statute is clear, that is the end of the matter. If,

² id

³ id

however, the statute is silent or ambiguous with regards to a specific issue, then the court must accept the interpretation of the agency as long as it is reasonable.

. In the Junk Fax Act, the qualifications to limit the EBR are extremely broad. For example, in the language of “determining that a significant number of complaints involving unsolicited faxes sent under an EBR that is older than what the FCC believes is consistent with the reasonable expectations of consumers” there can be numerous interpretations of “reasonable expectations of customers”. Small business owners and consumers will differ dramatically in this evaluation. Thus, using an arbitrary and capricious matter of review, it is most likely that the court will defer to the FCC’s expertise in deciding whether or not to limit the EBR. Depending on the FCC’s interpretation, the consumer may be likely to endure endless faxes. It is with this fear that I make the following recommendations:

1. The Established Business Relationship Exemption:

In establishing an EBR, the commission should recognize that a person has voluntarily agreed to make a number available for public distribution only where that person has explicitly stated that they wish to receive unsolicited commercial messages. In balancing the scale of equities between the sender and recipient of junk faxes, it is recognized that the process need

not be overly burdensome to the sender. However, the burden should rest with the sender to establish that the recipient has agreed to make the number publicly available. If nothing else, the sender should have to make “reasonable efforts” to confirm that recipients have “voluntarily” agreed to allow their numbers to be made publicly available when the sender obtains the fax numbers from a directory, advertisement, or site on the Internet.

The mere presence of a fax number in a directory should not indicate that a voluntary agreement exists with the future recipient. Companies that publish directories often use tactics that are subtle in order to populate the database with as many numbers as possible without notice to the individual, consent, or any degree of voluntariness.⁴ For instance, many companies use the practice of “enhancement” or list “appendage”.⁵ This practice allows the sender/company to buy more personal information on the consumer based on data that is collected at the point of sale. It is shocking to know that by merely giving your name to a retailer, they can in turn use a data collecting service to obtain your address, phone and fax numbers. The presence of this consumer information found in the databases of the data collection brokers does not in any way, shape or form constitute voluntary agreement to share the number with other businesses.

⁴ In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Comments of the Electronic Privacy Information Center Concerning Implementation of the Junk Fax Prevention Act of 2005, “Recognition of an Established Business Relationship Exemption”, Docket No. CG 05-338, (January 18, 2006).{be more specific; what comment are you referring to?}

⁵ See id, pg. 1

In addition, information companies should not be able to send unsolicited advertisements to fax numbers that are found on internet sites unless there is a voluntary agreement existing. Evidence of a voluntary agreement should only be found when a person lists their fax number on an internet site that they control-coupled with some sort of permission to receive unsolicited advertisements. If the Commission allows for such a broad loophole, it would allow information companies to simply post online every permutation of a phone number. This would enable junk faxers to exploit the exemption resulting in tens of thousands if not millions more pieces of junk fax.

The bills original intent was good. It was to allow legitimate businesses to continue faxing their customers without having to obtain written consent, a burdensome new requirement that would have imposed mountains of needless paperwork on business owners. It seems, however, that there should be some middle ground in obtaining a more explicit opt-in agreement without extreme burden to business owners.

It is unfair to allow advertising that shifts the burden of cost to the consumer to be sent to fax owners based on a claim (often untrue) that an EBR exists. The burden of proof for the existence of an EBR should rest on the shoulders of the fax sender rather than the recipient. This is especially true in light of the fact that the recipient has the burden of paying for the

paper, toner and ink, not to mention the annoyance of the line being tied up at inopportune times, etc.

Many companies claim that the task of tracking and proving existence of an EBR is too onerous and costly for them to bear. However, popular customer relationship management (CRM) or contact management software (such as ACT) tracks interaction with customers and can provide an audit trail to support the existence of the EBR. Some of the more advanced software allows companies to track and manage their relationship with their customers, including past sales, customer service experiences, etc., as well as provide insight into possible opportunities with those customers. Other, less complex software simply provides for tracking transactions with customers. In either case, the software can be easily used to document an EBR. The burden should be upon the sender to keep this trail of contacts to prove the existence of an EBR.

2. Limiting the Time Period of the Established Business Relationship:

Considering the low threshold for establishing a business relationship, the duration of time that a relationship can be deemed to exist should be as limited as possible. Buying a cup of coffee at Starbucks should not give a business owner or a junk faxer the right to look up a customer's number in a database and begin faxing. This is unfortunately the current status of the junk faxers regime. The FCC proposes to limit the EBR duration

to 18 months following a purchase or transaction and three months after an inquiry. As mentioned before, the sophistication of certain software makes it simpler to keep track of customer data. I do not believe it would be burdensome for businesses to shorten the EBR duration substantially. The FCC should consider that the proposed 18/3 limitation⁶ allows the consumer to receive unsolicited advertisements for a period of a year and a half. Again, this places an undue burden on the consumer when balanced against business interest.

It is important to note that much of the junk fax problem can be attributed to small businesses. Many of Fax.com's clients were small businesses that promoted various products such as vacations, grandfather clocks, and health insurance. Small businesses should have to shoulder their share of the burden. Any analysis of costs to large and small businesses should be weighed against the harms caused to consumers by this form of unsolicited advertising.

This also raises an important issue in terms of who should be liable. Thus far, the FCC has fined only the commercial faxing companies. However, if the FCC were to make the small businesses partly responsible for the junk faxing violations, the amount of wasted paper may rapidly diminish. Moreover, in addition to the underlying business opt-out number given on the fax, the number of the actual faxing company should be listed. This would enable consumers to call the faxing company directly and put their number

⁶ 18 months from a purchase or transaction; 3 months from an inquiry.

on a “do not fax” list. As it is set up now, the consumer has to call a specific number for every junk fax they are sent. This is time-consuming and burdensome.

3. Clear and Conspicuous Notice of the Opt-Out

There are many ways to frustrate opt-out opportunities. As mentioned above, I receive many faxes in which the 1-800 opt-out numbers are either cut off at the bottom of the fax or illegible. Many companies include the fax numbers but at a font so small that it is almost impossible to read. For these reasons, it is important to set some specific standards.

A “clear and conspicuous” notice should: (1) appear at the top of the message, (2) be sent on a standard size 8.5 x 11” format advertisement (to reduce risk that the recipient’s machine would truncate or “cut off” the message), (3) be printed in black font, (4) be printed in English, (5) be enclosed in a “box” or other design element so that it is separate from the advertising copy, (6) be printed at a font size no smaller than 12 point, (7) identify that it is being sent pursuant to an EBR, (8) identify the company asserting the EBR, and (9) identify the fax broadcaster, if different than the company with the EBR.⁷

4. Time Permitted to Respond to a “Do Not Fax” Request:

⁷ See EPIC Comments, p. 4

With modern sales contact and fax transmission software, senders should be able to comply with requests to opt out from the EBR in less than 5 days. Thirty days may have been reasonable at a time where fax numbers were being programmed into actual machines and sent manually. However, as technology enables greater efficiency, the time limit for an EBR opt out should shorten. With customer relationship and management software (discussed above) available, the process of automating a system to collect opt-out requests and feed a suppression list into the transmission software is not difficult, and in fact could be accomplished immediately.⁸

Conclusion:

There are thousands of complaints not to mention lawsuits that have been filed against junk faxing companies such as Fax.com. The FCC has also fined Fax.com \$5 million for violating the TCPA. Even the law firm that represents the Fax Ban Coalition (a group of companies that lobbied for the JFPA), Covington and Burling, has sued under the TCPA because it received over 1,000 junk faxes in a day from Fax.com. The firm obtained a \$2.2 million judgment in the case.⁹

In light of these recent cases, it seems obvious that the fax blasting companies are violating rules and causing extreme burden to the public at large. The intent of a fax machine is to conduct business and to communicate

⁸ See EPIC Comments, p. 5

⁹ Lisa Napoli, Crusaders Against Junk Faxes Brandish Lawsuits, The New York Times, Dec. 16, 2003, p. C1

with family, friends and business partners. It is not an open invitation for unscrupulous advertisers to block your phone lines, run up your operating budget and waste paper. Consumers are entitled to the “quiet enjoyment” of their home and that protection is taken away when they are no longer in control of their property. I implore the FCC to revisit the Junk Fax Protection Act of 2005 and review the broad existence of the EBR through the eyes of the consumer.

Respectfully submitted,

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